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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 946

JAMES STEVEN HOGG, ... Petitioner,

versus

UNITED STATES OF AMERICA, . . Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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WESTERFIELD-GOULD CO., INC., 610 W. KENTUCKY, LOUISVILLE, KY.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. _____

JAMES STEVEN HOGG, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

James Steven Hogg (hereafter "the taxpayer") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in cause number 19,716.

Opinions Below.

The opinion delivered in cause number 19,716 upon the rendering of the judgment sought to be reviewed is reported officially as *Hogg* v. *United States*, 428 F. 2d 274 (6 Cir. 1970), and a copy of that opinion is appended to this petition at Appendix A. The opinion of the United States Court of Appeals for the Sixth Circuit delivered in cause number 18,745, a companion case involving the taxpayer

and one of the issues raised in this petition, is reported officially as *Hogg* v. *United States*, 411 F. 2d 578 (6 Cir. 1969), and a copy of the opinion so delivered is appended to this petition at Appendix B.

Jurisdictional Grounds for Certiorari.

The judgment of the United States Court of Appeals for the Sixth Circuit in cause number 19,716 sought to be reviewed was entered on June 24, 1970. A copy of that judgment is appended to this petition at Appendix C.

A timely petition for rehearing in banc of the judgment so entered, addressed to the merits thereof, was denied by an order entered on August 12, 1970. A copy of that order on rehearing is appended to this petition at Appendix D.

The statutory provision believed to confer on this Court jurisdiction to review the judgment hereinabove referred to by writ of certiorari is 28 U.S.C. § 1254(1).

Questions Presented for Review.

There are two questions presented for review. They are:

1. When a jury has returned a special verdict upon a controlling issue (that there was no deficiency in tax) which precludes it from reaching or considering secondary issues (whether part or all of a deficiency in tax is due to fraud or negligence), do erroneous instructions on those secondary issues constitute prejudicial and reversible error?

2. Does a United States Court of Appeals have jurisdiction to hear and decide an appeal taken in behalf of the United States when neither the Solicitor General nor anyone in his office ever authorized the taking of an appeal or the filing of a notice of appeal within the time prescribed therefor by the Rules of Civil (now Appellate) Procedure?

Statutes, Rules of Court and Regulations Involved.

The questions presented for review involve the following statutes, rules of Court and regulations, the pertinent text of each of which is set forth in Appendix E to this petition:

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Internal Revenue Code of 1954, § 6653.

26 U.S.C. § 6653. Failure to pay tax.

Treasury Regulations, Section 301.6653-1.

26 C.F.R. § 301.6653-1. Failure to pay tax.

Title 28, United States Code, *Judiciary and Judicial Procedure.*

28 U.S.C. § 2111. Harmless error.

Statement of the Case.

The taxpayer sued in the United States District Court for the Eastern District of Kentucky under 28 U.S.C. § 1346(a)(1) to recover income tax deficiencies and negligence and fraud penalties thereon which he claimed had been illegally assessed and collected from him. The case was submitted to a jury upon special interrogatories, the first of which required it to determine whether the taxpayer had reported all of the income he was required to report for each year in issue. The jury was told that if it found no understatement of income for any year it need not proceed any further, but that, if it determined there was an income deficiency for any year, it should then decide whether part or all of that deficiency was due either to fraud or negligence.

The jury returned a special verdict on July 27, 1967. It found, under the first interrogatory, that there was no deficiency in income for any year. Having decided for the taxpayer on this primary, controlling issue, the jury could not and did not reach the secondary issues of fraud and negligence. Upon the verdict so rendered, the District Court entered a judgment in favor of the taxpayer.

Within 60 days after the government's motion for a new trial was denied on November 15, 1967, an attorney in the Tax Division of the Department of Justice directed the United States Attorney for the Eastern District of Kentucky to file in the District Court a notice of appeal from the judgment so entered, and the latter did so on January 8, 1968. Neither the Solicitor General nor anyone in his office authorized the United States Attorney to appeal from the judgment entered by the District Court before that notice of appeal was filed. The reason given by the

attorneys in the Tax Division was that they considered it imperative for the Solicitor General to have a transcript of the trial proceedings and evidence in order to decide whether an appeal should be taken and the obtaining of such a transcript was delayed because the court reporter was overworked. It was not until early July of 1968, more than six months after the expiration of the time provided by Rule 73(a) of the Federal Rules of Civil Procedure for the filing of a proper notice of appeal, that the trial transcript was obtained and the Solicitor General authorized the taking of an appeal from the judgment entered by the District Court on September 5, 1967.

Conceiving the notice of appeal to be an unauthorized and an invalid one, the taxpayer moved the District Court to strike it. From the order entered by that court to this effect, the government prosecuted an appeal. The Court of Appeals reversed, holding that the District Court had no jurisdiction to strike the notice of appeal after it had been filed. The determination of the validity of the notice of appeal, however, was reserved "until such time as it is properly raised." *Hogg* v. *United States*, 411 F. 2d 578 (6 Cir. 1969).

When the government's appeal reached the Court of Appeals on its merits, the taxpayer moved to dismiss the appeal on the ground that the Solicitor General had not authorized it to be taken before the notice of appeal was filed. This motion was passed to the merits. Upon decision, the Court of Appeals for the Sixth Circuit first held that the notice of appeal was a valid, timely and properly authorized one. It then reversed and remanded for a new trial because of errors in the instructions on the secondary issues of fraud and negligence. *Hogg* v. *United States*, 428 F. 2d 274 (6 Cir. 1970).

Both of the questions presented for review in this petition were raised in and urged upon the Court of Appeals for the Sixth Circuit but were decided adversely to the taxpayer.

Reasons Relied on for Allowance of the Writ.

There are special and important reasons why this Court should exercise its discretion in favor of reviewing by writ of certiorari the judgment the petitioner seeks to have reviewed. These reasons will be given separately as each question presented for review is argued.

I. The Reviewing Court of Appeals, in Direct Conflict With Other Courts of Appeal, Set Aside a Special Jury Verdict Upon a Controlling Issue Which Was Dispositive of the Entire Case Because of Alleged Errors in the Instructions on Secondary Issues Which the Jury Could Not Reach or Decide.

This case was submitted to the jury on special interrogatories, the first of which read as follows:

"QUESTION NO. 1.

"Did Mr. Hogg report on his returns for 1959, 1960, 1961 and 1962 as much taxable income as you believe from the evidence he had for each of those years, and did he sustain a loss of $9,016.00 from his law practice and his rental and farm properties for the year 1964? Answer:

"(And then there are two lines drawn for your answer. Under one line it says 'Yes' and under the other line it says 'No.' When you have answered that question, you should write your answer on the appropriate line, either 'Yes' or 'No,' whichever your answer is.)

"If your answer to this question is 'Yes,' you do not need to proceed any further.

"If your answer to this question is 'No,' you must answer the following questions . . . ."

The remaining interrogatories related to each year in issue, individually. The jury was asked to determine whether the taxpayer reported on his return all of the income it believed from the evidence he had for that particular year, and, if the jury found that he did not, it then was asked to determine whether any of the understatement it found to exist was due to negligence for the year 1959 or fraud for the years 1960, 1961 and 1962.

The jury answered the first interrogatory "Yes." Under the instructions given by the trial court it could not proceed any further. Thus, it did not reach or decide the negligence and fraud issues because of the special finding it made on the first interrogatory.

This interrogatory correctly states the law and the court below found no error in it.

The additions to tax (civil penalties) for fraud and negligence prescribed by § 6653 of the Internal Revenue Code, 26 U.S.C. § 6653, can be imposed and collected only if part or all of "any underpayment of tax" is due to fraud or negligence. If a taxpayer files timely returns (which the taxpayer admittedly did in the case at bar) and he reports on those returns all of the income he is required to report, there is no underpayment of tax whatever, and hence the fraud and negligence penalties cannot be imposed. This is axiomatic. Treas. Reg. § 301.6653-1; 10 Mertens, *Law of Federal Income Taxation*, §§ 55.09 and 55.25.

Having found that the taxpayer reported on his returns all of the income he was required to report, the jury could not reach or decide the secondary issues of fraud and neg-

ligence. Indeed, its finding on that controlling issue was dispositive of the case and rendered those secondary issues moot.

Under these circumstances, any error in the instructions on the secondary issues of fraud and negligence were bound to be harmless error which must be disregarded on appeal. Civil Rule 61 and Criminal Rule 52(a) both provide that any error which does not affect the substantial rights of the parties must be disregarded, and 28 U.S.C. § 2111 specifically declares that, on appeal, the appellate court must decide the case without regard to errors of that kind.

The taxpayer expressly presented this point to the court below and argued it extensively in his petition for rehearing. The Court of Appeals for the Sixth Circuit, however, does not even mention this point in the opinion it rendered. Without finding any error whatever in the first interrogatory propounded to the jury, the court below simply held that error in the instructions on issues which the jury could not even reach (because of its answer to the first interrogatory) constituted prejudicial and reversible error. The reviewing court thus invaded the province of the jury in an area where no error at all was found to exist.

The correctness of this conclusion is an important question of federal law which calls for an exercise of this Court's power of supervision for two reasons. *First*, the decision of the court below is in direct conflict with decisions of the Courts of Appeal for the Second, Fifth, Eighth and Tenth Circuits on the same point. *Second*, the decision of the court below conveys the erroneous impression that the ad valorem penalties for fraud and negligence can be imposed if there is no deficiency in tax.

The holding of the court below generates a split among the circuits. Issues such as contributory negligence, com-

parative negligence, last clear chance and proximate cause in a tort case are secondary to the controlling issue of negligence, just as fraud and negligence penalties in a tax case are secondary to the dispositive issue of whether there is a deficiency in tax. Uniformly it has been held that errors respecting the instructions or the admissibility of evidence on those secondary issues are harmless if the jury returns a special verdict finding that the defendant was not negligent.

The Second Circuit, in *Selh* v. *Moore-McCormack Lines, Inc.*, 362 F. 2d 541 (2 Cir. 1966), has held that even though the trial court may have erred in the admission and rejection of evidence on the issue of proximate cause, nevertheless those errors afford no basis for reversal and cannot be considered on appeal where the jury has rendered a special verdict finding no negligence on the part of the defendant.

The Fifth Circuit also has held that the failure of the trial judge to instruct on the secondary issue of last clear chance was harmless error in the light of a specific finding by the jury that the defendant was not negligent. *Haydel* v. *American Employers Insurance Company*, 339 F. 2d 201 (5 Cir. 1964).

Similarly, the Eighth Circuit has applied the "harmless error" rule to the erroneous failure to give an instruction on the secondary issue of comparative negligence when the jury has found specifically for the defendant on the controlling, dispositive issue of negligence. *Lowe* v. *Taylor Steel Products Co.*, 373 F. 2d 65 (8 Cir. 1967), *cert. denied*, 389 U. S. 858; *Warren* v. *Ward*, 371 F. 2d 906 (8 Cir. 1967); *Sellars* v. *Logan Towing Company*, 414 F. 2d 852 (8 Cir. 1969); and *Ramseyer* v. *General Motors Corporation*, 417 F. 2d 859 (8 Cir. 1969).

And the Tenth Circuit holds that any error in the instructions given on the secondary issue of contributory neg-

ligence is harmless and not prejudicial if the jury returns a special verdict on the controlling issue of negligence in which it finds no negligence whatever on the part of the defendant. *Worden* v. *Tri-State Insurance Company*, 347 F. 2d 336 (10 Cir. 1965). *Cf. Cities Service Oil Co.* v. *Harvey*, 148 F. 2d 780 (10 Cir. 1945); *Miller* v. *Brazel*, 300 F. 2d 283 (10 Cir. 1962); and *Campbell* v. *Barnett*, 351 F. 2d 342 (10 Cir. 1965).

Thus, even assuming the Court of Appeals was correct in its conclusion that the trial court's instructions on the negligence and fraud issues were erroneous, the reviewing court had neither the right nor the power to set aside the jury's verdict based upon its affirmative response to the first interrogatory which in turn rendered the negligence and fraud issues moot. For it to do so amounts to an unwarranted invasion by the reviewing court of the province of the jury and a refusal to apply the "harmless error" rule[1] which all the other circuits recognize and apply under identical circumstances.

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[1]The court below also refused to apply the "harmless error" rule to the instructions on the dependency exemptions which it found to be erroneous. Those exemptions amounted to only $1,200.00 per year, but the taxpayer's proof showed that he had overreported his income by more than that amount for each year in issue and thus was entitled to a refund even though the dependency exemptions were disallowed. The reviewing court found no error whatever in the instructions on the other issues which entitled the taxpayer to a refund irrespective of whether the dependency exemptions were allowed or disallowed. Under these circumstances, any error in the instructions on the dependency exemptions was bound to be a harmless one. This point was raised explicitly and argued extensively on rehearing. The court below, however, does not even mention that point in its opinion. It concluded that the error it found to exist in the instructions on the dependency exemptions was prejudicial and reversible, notwithstanding the fact that had the trial court given the government a directed verdict on this issue the taxpayer still would have reported all of the income he was required to report if the jury believed his evidence on all the other issues, which the jury obviously did.

II. The Technique Employed by the Attorney General of the United States in Taking "Protective" Appeals Effectivly Thwarts and Circumvents the Mandatory Time Limits Prescribed by the Rules of Procedure for the Taking of Properly Authorized Appeals to the Courts of Appeal and Creates Needless Confusion and Uncertainty in the Administration of Appellate Justice.

Rules 3 and 4 of the Appellate Rules and their predecessors, Civil Rule 73(a) and Criminal Rule 37(a), presuppose the filing of a properly authorized notice of appeal within the time limits specified. They also presuppose that if a notice of appeal is filed, it will be for the purpose of taking a genuine, meritorious appeal and not merely for delay. Indeed, Civil Rule 11 provides that the signature of an attorney to a pleading constitutes a certificate by him that he has read it, that there is good ground to support it and that "it is not interposed for delay." *Cf.* 2A Moore, *Federal Practice* ¶11.02, at 2103.

If an appeal is to be taken by the government, the Solicitor General must authorize it to be taken [28 C.F.R. § 0.20(b)] and this must be done before the notice of appeal is filed. Section 5(a) of Attorney General's Order No. 207-60 specifically provides that "the Solicitor General shall determine . . . whether an appeal is to be taken" and that "no appeal shall be prosecuted to a court of appeals without the express authorization of the Solicitor General."

The technique has developed of late, however, for the government to take "protective" appeals. The Attorney General defines such an appeal as being one which is taken for the sole and only purpose of gaining time. It is an appeal taken without the prior authorization of the Solicitor General in order that the Department of Justice may have more time to consider the case and so that the Solicitor Gen-

eral may have more time to determine whether an appeal should be taken. Section 6(a) of Attorney General's Order No. 207-60 directs United States Attorneys to file a "protective notice of appeal" when the time for appeal "is about to expire" in order that the Department of Justice "may have adequate time to consider the case" and so that "the appropriate division of the Department [i.e., the Office of Solicitor General]" can determine "whether an appeal is to be taken."

The validity of such a "protective" appeal is an important question of federal law, not heretofore raised or decided, which ought to be settled by this Court. If the technique of taking such an appeal is to be sanctioned and condoned, needless delay, uncertainty and confusion in the administration of appellate justice will be the inevitable result and, in addition, the mandatory time limits which this Court was so careful to prescribe in the Rules of Procedure for the taking of appeals will be circumvented and rendered meaningless.

In approving the technique of taking a "protective" appeal the court below ignored completely the history of Appellate Rules 3 and 4 and their predecessors, Civil Rule 73(a) and Criminal Rule 37(a), as well as the construction placed upon those rules by this Court and the Advisory Committee on Rules of Civil Procedure appointed by it. A short summary of this history will reveal quite clearly that the 1946 amendment to Civil Rule 73(a) was adopted for the express purpose of enabling the Solicitor General to have ample time within which to authorize the taking of an appeal before the filing of a notice of appeal and thus preclude the taking of "protective" appeals by the government.

Prior to 1946, the Civil Rules provided that an appeal could be taken by filing a notice of appeal within the time

prescribed by law, which ranged from as little as 20 days to as much as three months. In 1944, the Judicial Conference of Senior Circuit Judges recommended to the Advisory Committee on Rules of Civil Procedure appointed by this Court that Rule 73(a) be amended so as to allow a uniform 30-day period for the taking of an appeal, except that the period should be 60 days "in cases wherein the United States is a party." 9 Moore, *Federal Practice* ¶203.25[1], at 778.

The Advisory Committee accepted this recommendation. It proposed that Rule 73(a) be revised so as to allow 30 days for the filing of a notice of appeal subject to certain specified exceptions, the first of which was that 60 days would be allowed to all parties for the filing of such a notice in any action in which the United States or an officer or agency thereof is a party. The Advisory Committee explained to this Court the precise reason for this exception in its Notes (Advisory Committee Notes to Amendments of Rule 73(a), 9 Moore, *Federal Practice* ¶203.25[1], at 778) as follows:

> "In cases where the United States or an officer or agency thereof is a party, allowance of sixty days to the government, its officers and agents is well justified. For example, in a tax case the Bureau of Internal Revenue must first consider and decide whether it thinks an appeal should be taken. This recommendation goes to the Assistant Attorney General in charge of the Tax Division in the Department of Justice, who must examine the case and make a recommendation. The file then goes to the Solicitor General, who must take the time to go through the papers and reach a conclusion. If these departments are rushed, the result will be that an appeal is taken merely to preserve the right, or without adequate consideration, and once taken it is likely to go forward, as it is easier to refrain from an appeal than to dismiss it. Since it would be unjust to allow

> the United States, its officers or agencies extra time and yet deny it to other parties in the case, the rule gives all parties in the case 60 days. The Judicial Conference of Senior Circuit Judges in 1945 recorded itself as in favor of extending the additional time of 60 days to all parties in any case where the United States or its officers or agencies were parties. * * *"

Thus, the sole and only purpose of the special, 60-day exception to the time limits prescribed for the taking of appeals generally was to allow the government twice as much time as that allowed an ordinary litigant within which to file a notice of appeal so that the Department of Justice and the Solicitor General would not be "rushed" into taking a protective appeal "merely to preserve the right, or without adequate consideration." In short, the government was to be allowed an additional 30 days within which to file a notice of appeal in order that the Department of Justice would have adequate time to consider the case and the Solicitor General could authorize an appeal to be taken before the notice of appeal was filed.

It was in this context that the revision of Civil Rule 73(a) as proposed by the Advisory Committee was adopted by order of this Court on December 27, 1946 (329 U. S. 839), and Congress permitted it to become effective on March 19, 1948 (H. Doc. 46, 80th Cong.).

Underlying this history and construction of the 1946 amendment to Civil Rule 73(a) is the real vice of a protective appeal. The sole and only purpose of taking such an appeal is delay, a practice proscribed by Civil Rule 11. And the effect of taking a protective appeal is to enable the party taking it to obtain a unilateral, unlimited extension of time within which to determine whether an appeal really should be taken. This reads complete flexibility into, and effectively circumvents, the mandatory time limits pre-

scribed by Appellate Rule 4 and its predecessors for the taking of a properly authorized, meritorious and bona fide appeal.

United States v. *Robinson*, 361 U. S. 220, settled the question of whether courts may, by judicial construction, read flexibility into the time limits set forth in the Rules of Procedure for the taking of an appeal. This Court clearly held that they cannot. If more time is needed than that allowed by the rules, the matter "must be resolved through the rule-making process and not by judicial decision." The reason given for depriving courts of the power to make flexible the time limits set forth in the rules for the taking of appeals by judicially sanctioning practices which circumvent those time limits is a salutary one. Appeals "might—almost surely would—be indefinitely delayed" and the end product would be "intolerable uncertainty and confusion."

The instant case illustrates very clearly the unlimited delay and "intolerable uncertainty" which are inherent in the taking of a "protective" appeal. In the case at bar, the protective notice of appeal filed by the government enabled it to obtain a six-month extension of time for the Solicitor General to authorize an appeal to be taken when the maximum extension the District Court itself could have granted for the filing of a properly authorized notice of appeal was only 30 days. If the court reporter had not completed transcribing the evidence when she did, the extension of time would have been longer, and had she died the extension could have been in perpetuity. As it turned out, the transcript was received by the Department of Justice some 11 months after the conclusion of the trial, and the Solicitor General did not authorize an appeal to be taken until more than eight months after the time for filing a properly authorized notice of appeal began to run.

Another important aspect of a protective appeal which is worthy of consideration by this Court is the "intolerable . . . confusion" and administrative disorder it creates. How many records have been gathered and transmitted to the Courts of Appeal only to be returned because the Solicitor General decides, after a protective notice of appeal has been filed, that an appeal will not be taken at all? And how much time of the appellate courts has been wasted in docketing protective appeals and passing upon motions for extensions of time to file the record or briefs on appeal while the Solicitor General or someone in the Department of Justice is considering whether an appeal really should be taken? The taxpayer cannot answer these questions. But the Solicitor General should be in a position to answer them and presumably will do so in his response to this petition.

We respectfully submit that the technique of taking a protective appeal in behalf of the government is of such importance to litigants and to the orderly administration of appellate justice as to warrant the exercise by this Court of its supervisory powers.

To file a "protective" notice of appeal for the purpose of obtaining additional time for the Solicitor General to decide whether to take a bona fide appeal to a Court of Appeals is a practice which should receive as much approval as this Court would grant if someone in the Department of Justice were to file "protective" petitions for writs of certiorari for the purpose of obtaining additional time for the Solicitor General to decide whether certiorari really should be sought.

Conclusion.

For the reasons given we respectfully ask the Court to exercise its supervisory powers by granting a writ of certiorari to review the judgment entered by the Court of Appeals for the Sixth Circuit in the case at bar.

Respectfully submitted,

S. RUSSELL SMITH,
HERBERT L. AWE,
Counsel for the Petitioner.

November 6, 1970.

APPENDIX A.

Opinion,
Delivered on June 24, 1970, as Amended on August 14, 1970,
In
Hagg v. United States, 433 F. 2d 374 (8 Cir. 1970),
upon
Rendering of the Judgment Sought To Be Reviewed.

No. 19716

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JAMES STEVEN HOGG, - - - *Plaintiff-Appellee,*

v.

UNITED STATES OF AMERICA, - *Defendant-Appellant.*

APPEAL from the United States District Court
for the Eastern District of Kentucky.

OPINION—Decided and Filed June 24, 1970,
As Amended August 14, 1970.

Before PHILLIPS, Chief Judge, EDWARDS, Circuit Judge, and O'SULLIVAN, Senior Circuit Judge.

PHILLIPS, Chief Judge. This appeal by the Government is from a judgment in favor of the taxpayer for a refund of income taxes, penalties and interest for the years 1959 through 1963, in the total amount of $32,968.34 plus statutory interest.

The judgment is based upon the verdict of the jury, which answered affirmatively the following interrogatory:

> "Did Mr. Hogg report on his returns for 1959, 1960, 1961 and 1962 as much taxable income as you believe from the evidence he had for each of those years, and did he sustain a loss of $9,016.00 from his law practice and his rental and farm properties for the year 1964?"

The opinion of this Court on an earlier appeal in this proceeding is reported at 411 F. 2d 578.

On the present appeal we consider two issues: (1) The motion of the taxpayer to dismiss the appeal; and (2) whether reversible error occurred during the course of the trial. We overrule the motion to dismiss the appeal and find reversible error for the reasons stated in this opinion. We reverse and remand for a new trial.

The taxpayer is a lawyer in Jackson, Breathitt County, Kentucky. He testified that during the years in question his law practice consisted exclusively of representing plaintiffs in personal injury cases which he handled on a contingent fee basis. The taxpayer was admitted to the bar in 1942 but did not devote his full time to the practice of law until 1949. Between 1936 and 1949 he owned and operated the only drugstore in Breathitt County. He sold that drugstre in 1949 for $27,000 and thereafter practiced law.

During the four years involved in this action the taxpayer's sources of income were his law practice, a one-half interest in two farms which he and his sister inherited from their mother in 1958, and a building in Jackson known as the Hogg Building in which the taxpayer lived and maintained his law office. Some offices in the Hogg Building were rented as commercial space while other space was rented to transients as sleeping rooms. During 1959 and a part of 1960 the taxpayer and his sister each owned a one-half interest in the Hogg Building, which was inherited from their father in 1918, subject to the dower interest of their mother. On June 21, 1960, the taxpayer purchased his sister's half interest in the Hogg Building for $32,500 of which $10,833.34 was paid at the time of sale. The balance was paid in two installments of principal in the amount of $10,833.33 each in 1961 and 1962, plus interest.

The taxpayer kept no books and records of his income other than the tax returns filed by him. He said that he could not recall who his clients were in the tax years here involved. He did not have copies of leases of any of his tenants in the Hogg Building. There was no record of any income from his farms. He maintained no receipt book reflecting any income from any source. He produced can-

celled checks and receipts in support of some of the deductions claimed on his tax returns. His method of recording his income, according to his testimony, was through the use of three cigar boxes kept in a safe in his law office.

Gross receipts from his law practice were placed in the first cigar box. After he acquired his sister's interest in the Hogg Building in 1960, all receipts from tenants in this building were placed in a second cigar box which was identified easily because it bore the insigna of a different brand of cigars. At the end of the year he would count the money in each cigar box, enter at the appropriate place on his tax return the total of the amounts in the two cigar boxes, and remove the money from each box so as to start anew at the beginning of the year. He treated his tax returns as his permanent record of gross receipts. If the tax return was not prepared immediately after the end of the year, the taxpayer would enter his money count on a slip of paper in each of these two cigar boxes. Later, when preparing his tax return, he would report as gross receipts the amounts shown on these slips, then discard the slips.

The money removed after the end of the year from the first two cigar boxes was placed in a third cigar box, described by the taxpayer as his "reserve fund." All expenses were paid out of this third cigar box, either in cash, for which receipts were obtained, or by checks on the taxpayer's bank account in the First National Bank of Jackson. From time to time cash was taken from the "reserve fund" cigar box and deposited in the bank account to cover checks written for expenses, such as stenographic help, telephone, non-reimbursed court costs and the like.

The taxpayer made the first two payments for his sister's interest in the Hogg Building out of the cash in his "reserve fund" cigar box. The funds for the third payment were obtained by a loan from the First National Bank of Jackson. This loan was not repaid before the end of 1962.

Expenses such as travel and entertainment were paid in cash. The taxpayer computed his travel expense deductions by using the figure of 20¢ per mile to include food, lodging

and the cost of upkeep on his automobile. He determined his business mileage by reading the speedometer at the begginning and end of each year, claiming that he used his car for nothing except business purposes.

The taxpayer reported no profit from either the Hogg Building or the two farms because, in his view, there was no profit to report.

During the period when the taxpayer owned the Hogg Building and farm properties jointly with his sister, the income from these properties was deposited in a joint bank account known as the "special account." From these deposits the taxpayer and his sister would pay by check such bills as were chargeable against these properties. This special bank account was closed after the taxpayer purchased his sister's interest in the Hogg Building in June 1960. Thereafter the gross receipts from rentals derived from this building were placed in the second cigar box in the manner described above.

A divorce had terminated his only marriage. At the time of the trial his ex-wife had remarried. The two children of the taxpayer were in the custody of their mother. As of 1959 his son was in high school and his daughter in grade school. During the years at issue the taxpayer paid $100 per month in child support, totaling $600 per year for each child. He did not pay any other expenses incident to his children. During the years at issue both the taxpayer and his ex-wife claimed the two children as dependents on their separate income tax returns.

In May 1962 the taxpayer was contacted by a revenue agent. The agent requested certain records which the Government says were not furnished. During the course of the investigation by the agent the taxpayer signed a Form 870, agreeing to extend the statute of limitations for the taxable year 1959 until December 31, 1963. The taxpayer failed or refused to sign a second Form 870 further extending the statute of limitations. Relations between the agent and taxpayer began amicably but soon deteriorated. The agent testified that the lack of cooperation on the part of the tax-

payer was a significant factor in the decision to assess the penalty for civil fraud.

Deficiency assessments were made for each of the years 1959 through 1962. In reconstructing taxable income from 1959, the bank deposits method of recomputing gross receipts was used, coupled with disallowance of specific deductions. The deficiency assessed for 1959 totaled $5,053.87. For the years 1960-62, the net worth expenditures method of reconstructing income was used. Deficiency assessments for these years were as follows: $7,157.84 for 1960, $5,973.71 for 1961 and $10,452.12 for 1962.

In its brief on the present appeal the Government concedes that the revenue agent made certain mistakes in his report and that the deficiency assessments are erroneous to the extent that they reflect these mistakes. These mistakes were: (1) the inclusion of a bank deposit of $1,012.50 arising from an inheritance as income for 1959; (2) the inclusion as the taxpayer's income of 100 per cent rather than 50 per cent of the deposits in the "special" joint bank account of the taxpayer and his sister, the Government now conceding that the taxpayer had only a one-half interest in this account; and (3) the omission of the amount of $13,500 as an outstanding liability as of the end of the year 1962. This liability figure is stated to represent two separate bank loans in the amounts of $10,000 and $3,500 which the taxpayer obtained from the First National Bank of Jackson on July 6, 1962. The Government says the latter mistake was due to the fact that the entries on the bank ledger sheet were in the wrong column.

After a trial extending over a period of eight days the jury returned its verdict in favor of the taxpayer and judgment was entered against the Government.

1) The motion to dismiss

Before reaching the issues presented by the appeal on its merits we dispose of the taxpayer's motion to dismiss the appeal. This motion is grounded on the contention that the Government's timely notice of appeal filed January 8, 1968, is fatally defective because it was filed by the United States Attorney at a time when the Solicitor General had not authorized the appeal. The District Judge struck the Government's notice of appeal and ordered it expunged from the record on the ground that at the time of its filing the Solicitor General had not authorized the appeal. In the opinion reported at 411 F. 2d 578 this Court held that the District Court acted beyond its jurisdiction in striking the notice of appeal. The order of the District Court was vacated and the notice of appeal was reinstated. The clerk of the District Court was directed to prepare and transmit to this Court the record in the case.

In our former opinion this Court expressly reserved determination of the issue now presented by the taxpayer's motion to dismiss the appeal. A recitation of the various proceedings in the District Court is set forth at 411 F. 2d 578 and will not be repeated here. Suffice it to say that the court reporter, who had a heavy backlog of work, did not deliver the transcript to the Department of Justice until June 28, 1968. The Government contends that a decision as to whether to proceed with the appeal could not have been made until after the transcript had been received from the court reporter. Pending a definite decision as to whether to pursue the appeal, the Government contends that its right of appeal was protected by the notice of appeal filed by the United States Attorney on January 8, 1968. After the Department of Justice had received from the court reporter a copy of the transcript, a decision was made to proceed with the appeal.

The taxpayer's attack on the Government's notice of appeal is based upon the contention that certain internal procedures of the Department of Justice, which delegate to

the Solicitor General the duty of authorizing appeals to courts of appeals, had not been complied with at the time the notice of appeal was filed. Specifically the taxpayer relies upon 28 C.F.R. § 0.20.[1] It is argued by the taxpayer that one of the main purposes of the 1946 amendment to Rule 73(a), Fed. R. Civ. P., was to give the Solicitor General sixty days in which to authorize an appeal before the filing of the notice of appeal.

We reject the contention that the regulation defining the jurisdiction of the Solicitor General forecloses the Attorney General from directing that a notice of appeal be filed by a United States Attorney. The Attorney General has plenary power over the conduct of litigation to which the United States is a party.[2] Continuously since the creation of the

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[1]28 C.F.R., states with respect to the Solicitor General, as follows:

§ 0.20 *General functions.*

Subject to the general supervision and direction of the Attorney General, the following-described matters are assigned to, and shall be conducted, handled, or supervised by, the Solicitor General, in consultation with each agency or official concerned:

(a) Conducting, or assigning and supervising, all Supreme Court cases, including appeals, petitions for and in opposition to certiorari, briefs and arguments, and, in accordance with § 0.163, settlement thereof.

(b) Authorizing or declining to authorize appeals by the Government to all appellate courts, including petitions for rehearing *en banc.*

(c) Authorizing the filing of all briefs *amicus curiae* by the Government in all appellate courts.

(d) Surveying and listing appellate cases in the courts of appeals in which the government is participating.

[2]28 U.S.C. § 516. **Conduct of litigation reserved to Department of Justice**

Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reversed to officers of the Department of Justice, under the direction of the Attorney General.

28 U.S.C. § 519. **Supervision of litigation**

Except as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency,

(Footnote continued on following page.)

Department of Justice the Attorney General has exercised this power through his supervision over the various officers of the Department of Justice and the United States Attorneys and their assistants.[3]

In the present case the authority of the United States Attorney to file the notice of appeal came from two specific sources:

(1) The Tax Division of the Department of Justice directed that the notice of appeal be filed by the United States Attorney. The affidavit of David A. Wilson, Jr. an attorney in the Tax Division, is quoted in the footnote.[4]

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or officer thereof is a party, and shall direct all United States attorneys, assistant United States attorneys, and special attorneys appointed under section 543 of this title in the discharge of their respective duties.

This codification in §§ 516 and 519 constitutes a mere restatement of long existing law and no substantive changes in prior law were intended. H. Rep. No. 901, 89th Cong. 1st Sess. pp. 1-4, 186-187; S. Rep. No. 1380, 89th Cong., 2nd Sess. pp. 18-21, 205, 206.

[3]See Revised Statutes, Sec. 346, *et seq.* (5 U.S.C. 1940 ed., Sec. 291, *et seq.*) Executive Order No. 6166, June 10, 1933, Sec. 5 (5 U.S.C. (1958 ed.), pp. 139, 141); Act of June 22, 1870, c. 150, 16 Stat. 162, and Act of September 24, 1789, c. 20, 1 Stat. 73.

[4] AFFIDAVIT OF DAVID A. WILSON, JR.

CITY OF WASHINGTON }
DISTRICT OF COLUMBIA } ss.

David A. Wilson, Jr., of the City of Washington, District of Columbia, having been duly sworn, upon oath states as follows:

(1) That he is an attorney employed in the Tax Division, Department of Justice, Washington, D. C., and for the last several years has been assigned to duty as Chief of a section in the Tax Division, and that in that capacity he has, amongst other things, the duty, responsibility, and authority to supervise the conduct on behalf of the Government of suits for the refund of Internal Revenue taxes instituted against the United States, or any officer or agency thereof, in a number of judicial districts of the United States, including the United States District Court for the Eastern District of Kentucky (at Jackson);

(2) That, in his official capacity, the affiant has, upon delegation from the Attorney General through the Assistant Attorney General in charge of the Tax Division of the Department of Justice, the responsibility and authority, amongst other things, to supervise and direct the conduct of all litigation in which the refund is sought

(Footnote continued on following page.)

(2) The internal instructions of the Department of Justice, as set forth in Attorney General's order No. 207-60, provide that the United States Attorney shall file a notice of appeal if the time for appeal is about to expire and he has not received notice from the appropriate division of the Department of Justice as to whether an appeal should be taken. This order is quoted in the footnote.[5] The authority

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of Internal Revenue taxes in this Court, including the specific responsibility and authority to direct the filing of any pleading therein deemed appropriate, including the filing or causing to be filed of a notice of appeal on behalf of the United States from any judgment or order adverse to the United States;

(3) That, in his official capacity and in the exercise of his responsibility and authority, the affiant caused or directed the filing (through the United States Attorney, and an Assistant United States Attorney, both counsel of record in this case in this Court), of a notice of appeal on behalf of the United States in this case, and that he did so in good faith and upon the honest belief and firm opinion that good cause and good grounds existed for an appeal in this case and that the filing of a notice of appeal in this case was fully warranted and entirely proper, and that he did so cause or direct the filing of the notice of appeal in this case for the above-mentioned reasons and not for the purpose of delay or vexation or for any purpose inconsistent with Rule 11 or Rule 73(a) of the Federal Rules of Civil Procedure;

(4) That the affiant did cause or direct the filing of a notice of appeal on behalf of the United States in this case, as aforestated, notwithstanding the fact, of which he was fully aware, that, because of the continued inability of the United States to obtain a copy of the transcript of the trial proceedings in this case from the Court's Reporter, this case had not yet been submitted to the Solicitor General for his consideration and his decision as to whether an appeal in this case should be taken or prosecuted, and that his doing so under the circumstances was fully consistent and in keeping with a long-standing practice, followed for many years in the Department of Justice.

Dated at Washington, D. C., this 1st day of March, 1968.

[Signature and verification omitted]

[5]13. Attorney General's Order No. 207-60, July 18, 1960:

REGULATIONS GOVERNING APPELLATE PROCEEDINGS

By virtue of the authority vested in me by section 161 of the Revised Statutes (5 U.S.C. 22) and section 2 of Reorganization Plan No. 2 of 1950 (64 Stat. 1261), I hereby prescribe the following reg-

(Footnote continued on following page.)

for such filing runs directly from the Attorney General to the United States Attorney, independently of the duties of the Solicitor General.

28 U.S.C. § 510 provides that the Attorney General may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee or agency of the Department of Justice of any function of the Attorney General.

The taxpayer asserts that § 6 of Attorney General's order No. 207-60 (n. 5) is ineffective because it has not been published in the Federal Register as required by the Administrative Procedure Act, 5 U.S.C. § 552, and is in conflict with the published regulation in 28 C.F.R. § 0.20 (n. 1, *supra*). We hold that the Administrative Procedure Act does not require that all internal delegations of authority from the Attorney General must be published in order to be effective. Under the provisions of 5 U.S.C. § 552, the requirement for publication attaches only to matters which if not published would adversely affect a member of the public. See S. Rep. No. 813, 89th Cong., 1st Sess., p. 6, H. Rep. No. 1497, 89th Cong., 2d Sess., p. 7, 2 U. S. Code Cong. & Ad. News 2418, 2424. We fail to see how a taxpayer in the posture of the taxpayer in the present case could be affected adversely by the non-publication of internal instructions by the Attorney General to officers of

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ulations governing appellate proceedings in Federal and State courts in which the United States is interested.

APPEALS FROM DISTRICT COURTS TO COURTS OF APPEALS

* * *

Sec. 6. *Protective notice of appeal.*

(a) If the time for appeal is about to expire and the United States Attorney has not received notice from the appropriate division of the Department as to whether an appeal is to be taken, a notice of appeal—commonly called a "protective" notice of appeal— should be filed in order to preserve the Government's right to appeal, and such action should be reported to the appropriate division of the Department. In order that the Department may have adequate time to consider the case, such notice of appeal should not be filed sooner than five days before the time for appeal expires.

the Department of Justice, including United States Attorneys, as to their functions in the conduct of litigation to which the United States is a party. Any delay incident to the ultimate payment of the judgment in favor of a taxpayer which might result from the dismissal of an appeal or from an affirmance would be compensated for by the payment of interest at the rate of six percent per annum. 28 U.S.C. § 2411(a).

We find nothing in 28 C.F.R. § 0.20(b) (n. 1, *supra*) which requires the Solicitor General to have authorized the prosecution of an appeal before the filing of the notice of appeal. Neither the federal rules nor the provisions of 28 C.F.R. §§ 0.20 and 0.70 specify when the Solicitor General must render a decision with respect to prosecuting an appeal on behalf of the United States. Rule 73(a), Fed. R. Civ. P. (now Rule 4, Fed. R. App. P.) requires only that a notice of appeal in a case in which the United States is a party must be filed within 60 days after the entry of judgment. The running of the 60-day period is suspended by a motion for a new trial, which the Government made in this case. By filing its notice of appeal on January 8, 1968, the United States complied with the rule. In the absence of any demonstrable injury, the taxpayer has no more right to question the process by which a decision was made to file the Government's notice of appeal than the United States could question the procedure by which a private practitioner and his client reach a decision to file a notice of appeal.

The question presented by the motion to dismiss the appeal was decided by this Court in an unpublished order on a motion to dismiss a petition to review the decision of the Tax Court of the United States in *Commissioner* v. *Estate of Harry Stoll Leyman*, 344 F. 2d 763, cert. granted and vacated and remanded upon consent, 383 U. S. 832. Prior to the time this Court heard arguments in that case on its merits, the taxpayer filed a motion to dismiss the petition for review on the ground that it had not been authorized by

the Solicitor General. On December 19, 1963, a panel of this Court composed of Judges Shackelford Miller, Jr., Cecil and Phillips entered an order denying the motion to dismiss, saying:

> "Respondent has filed an additional motion to dismiss the petition for review on the ground that the appeal is 'a sham and frivolous' because it was taken by counsel for petitioner without 'belief there is good ground to support it' and because it was 'interposed for delay' with intent to defeat the purpose of Rule 11 of the Federal Rules of Civil Procedure. It is charged that the petition for review was filed for protective purposes to toll the appeal time pending a final recommendation to the Solicitor General by the Tax Division of the Department of Justice as to whether the petition for review shall be prosecuted further by the Government. The petitioner opposes this additional motion to dismiss, stating that the petition for review was filed on behalf of the Commissioner of Internal Revenue pursuant to general authority from the Solicitor General and pursuant to specific authority delegated by the Acting Chief Counsel for the Internal Revenue Service. The petitioner's Memorandum in Opposition to the Motion to Dismiss is supported by the affidavit of the attorney under whose direction the petition was prepared, stating unequivocally that the petition was filed in good faith on the firm belief that the decision of the Tax Court was erroneous, and not for purpose of delay or vexation.
>
> "Upon consideration the Court is of the opinion that both of said motions to dismiss are without merit and should be denied.
>
> "It is therefore ORDERED that both of said motions be and the same hereby are denied."

The taxpayer undertakes to distinguish this Court's ruling in *Leyman* because it involved a petition to review a

decision of the Tax Court, with respect to which 28 C.F.R. § 0.70 sets forth the general functions of the Assistant Attorney General in charge of the Tax Division of the Department of Justice, whereas the present case involves an appeal from the District Court controlled by C.F.R. § 0.20 (n. 1, *supra*). We do not find this distinction to be of significance. In *Leyman* the petition for review was filed by the Acting Chief Counsel for the Internal Revenue Service for protective purposes before a final recommendation had been made by the Tax Division to the Solicitor General and before the Solicitor General had decided to prosecute the appeal. In the present case the notice of appeal was filed by the District Attorney for protective purposes, at a time when the court reporter had not completed the transcript.

The motion to dismiss the appeal is overruled.

2) The appeal on the merits

The Government contends that a number of reversible errors occurred during the course of the trial. The chief basis of attack is that certain instructions given by Court were inadequate or inaccurate. We deal first with instructions concerning the duty of the taxpayer to maintain records which reflect his income and deductions.

During the trial the Government relied to a great extent for proof on the inadequacy of the taxpayer's records. The Government asserts on appeal that the instructions given by the District Court in regard to the taxpayer's statutory duty to keep records were so inadequate as to constitute reversible error. It is contended that these instructions were insufficient to apprise the jury of the duty imposed by statute on taxpayers to keep records that will adequately reflect income and deductions. We agree.

The Government requested an instruction concerning the taxpayer's lack of records in regard to the Government's allegation that the taxpayer had negligently filed his return for 1959 so as to be liable for the five per cent

negligence penalty. The Government requested the following instruction in regard to the year 1959:

> "If the plaintiff underpaid his income taxes for the year 1959, and any portion of that underpayment was a result of his negligence or intentional disregard of the rules and regulations of the Internal Revenue Code, then, Members of the Jury, he is not entitled to a refund of the 5% negligence penalty which was imposed on him for that year. The Internal Revenue Code and the Regulations require all taxpayers to keep adequate books and records. Mr. Hogg was obligated by law to meet these minimum bookkeeping requirements. There is no particular form of records which he was required to keep, except that such forms and records had to enable an Internal Revenue Agent to ascertain whether a tax liability had been incurred, and, if so, the amount of the tax.
>
> "Finally, with respect to this issue, the plaintiff bears the burden of proving that the assertion of a negligence penalty was erroneous. In other words, *plaintiff must prove by the preponderance of evidence that he satisfied the bookkeeping requirements of the Internal Revenue Code and Regulations.*" (Emphasis added.)

The taxpayer argues that the instruction given was the one requested by the Government. We disagree. While the instruction given is verbatim of the one requested through the first paragraph, the District Court deviated therefrom in such a manner as to constitute reversible error. The burden of proof on the issue was on the taxpayer and the jury should have been so informed. The instruction given by the Court was:

> "If the plaintiff underpaid his income taxes for the year 1959, and any portion of that underpayment was a result of his negligence or intentional disregard of

the rules and regulations of the Internal Revenue Code, then he is not entitled to a refund of the 5% negligence penalty which was imposed on him for that year. The Internal Revenue Code and the Regulations require all taxpayers to keep adequate books and records. Mr. Hogg was obligated by law to meet these minimum bookkeeping requirements. There is no particular form of records which he was required to keep, except that such forms and records had to enable an Internal Revenue Agent to ascertain whether a tax liability had been incurred and, if so, the amount of the tax.

"Negligence is the failure to use ordinary care. Ordinary care is that care which reasonably prudent persons exercise in the management of their own affairs."

The Government further requested instructions in regard to the taxpayer's lack of records in regard to the assessment of the 50 per cent penalty for civil fraud for the years 1960-62. The Court did not give an instruction in this matter at all.

We hold that the Government was entitled to an instruction in regard to each of the years in question that would adequately explain to the jury that the taxpayer has the burden of proving that he complied with the statutory duty to keep adequate records. Such instructions should explain that while no certain method of keeping records is required, they must be sufficient to ". . . establish the amount of gross income, deductions, credits or other matters required to be shown by such person in any return or information." Treas. Reg. § 1-6001-1 (1960) and § 6001 Internal Revenue Code (1954). Failure to give such instructions, in our opinion, was reversible error. In the case of *Halle* v. *Commissioner,* 175 F. 2d 500 (2d Cir.), involving a New York City attorney who failed to keep records, the Court said:

"The federal income tax system is one of self-assessment by the taxpayer. Its efficiency must depend largely on the truth of facts set out by the taxpayer in

his return. And, appropriately geared to the gravity of nondisclosure (or false disclosure), Congress has provided varied sanctions, both civil and criminal, to protect that system. Implicit in the working of the system is an obvious duty of keeping proper records imposed on the taxpayer. Nor must the fact be overlooked that the taxpayer here was no unlettered person, ignorant of the methods of business and the purlieus of the law, but, on the contrary, he was a successful lawyer, practicing under the keen competition that obtains in the largest city on this continent." 175 F. 2d at 502.

The taxpayer here does not practice in a large metropolitan area, but as a licensed and practicing attorney of the Kentucky bar he is sufficiently aware of the law and of business practices to know that certain types of records should be maintained in any business or profession, including his law office. As a lawyer he is chargeable with the knowledge that the income tax law requires him to keep records. If ignorance of those provisions of the tax laws requiring records is no excuse for the unlettered, *Harris* v. *Commissioner*, 174 F. 2d 70 (4th Cir.), then assuredly it is not an excuse for the failure of an attorney to keep records accurately reflecting his income. The Government was entitled to an instruction properly setting forth this duty. We hold that the failure of the District Court to give adequate and specific instructions to that effect constituted reversible error.

Since the case must be reversed and remanded we proceed to pass on two other questions for the guidance of the District Court on the new trial.

The taxpayer paid $600 each year to his ex-wife for the support of each of his two children. The evidence establishes that this was not more than one-half of the total amount expended for their support, including private schools, music lessons, summer camps and other expenses. Although the District Court recognized that to be entitled to a dependency exemption the taxpayer must provide more

than one-half of the *total* support, the following instruction was given:

> "The income tax laws permit a taxpayer to claim a dependency exemption for a child only if that taxpayer furnishes over one-half of the total amount spent for the support of that child. 'Support' means the amount required to provide a child with *reasonable* necessaries, including food, clothing, lodging, and education, medical and dental care, entertainment and the like, compatible with that child's status, station in life, surroundings and the environment in which he or she is required to, or does live. You should allow Mr. Hogg a dependency exemption of $600.00 for each child of him [sic] as to whom you believe from the evidence he furnished more than one-half of the support during 1959." (Emphasis added.)

A similar instruction was given for each taxable year in question.

This instruction was erroneous. *Tressler* v. *Commissioner*, 206 F. 2d 538 (4th Cir.). The taxpayer is obligated to prove both the total amount expended for each child and that the amount provided by the taxpayer is more than one-half of this amount. The taxpayer here did not attempt to prove the total amount expended on each child, but rather relied on his personal estimate of what he thought it ought to cost "reasonably" to support the children. The Government, on this issue, presented evidence sufficient to prove that the amounts expended by taxpayer were less than one-half of the total support expended for each child. While the Government did not attempt to prove all expenditures made for the children, it did prove sufficient expenditures to rebut the taxpayer's contentions in this regard. We hold the above-quoted instruction to be inadequate.

Taxpayer dated a check December 20, 1958, which according to his testimony was mailed in January 1959, as payment for law books. The check cleared the bank on

January 13, 1959. Taxpayer claimed the expense as a deduction for 1959. The Court instructed the jury that the expense occurred in 1959. The Government alleges that this is error. The Government correctly contends that if a check is honored payment made thereby relates back to the time of delivery. This proposition is irrelevant under the proof adduced by the taxpayer and unassailed by the Government. The Government seems to argue that the check was delivered in 1958, but the record is devoid of any evidence to this effect. The evidence being uncontradicted and not incredible, we hold that the District Court did not err in this instruction on this aspect of the case.

The Government presents a number of other issues which it contends to constitute a reversible error. In view of our disposition of the case, we find it unnecessary to pass upon these questions.

Because of the failure of the Court to instruct the jury properly in regard to the taxpayer's statutory duty to keep sufficient records to reflect adequately his income and deductions and his burden of proof on this aspect of the case we reverse the judgment of the District Court and remand the case for a new trial.

The motion to dismiss the appeal is overruled. The judgment is reversed and the case is remanded for a new trial.

APPENDIX B.

Opinion,
Delivered on May 28, 1969,
in
***Hogg* v. *United States*, 411 F. 2d 578 (6 Cir. 1969),**
a Companion Case Involving the Petitioner
and
One of the Issues Raised in His Petition for Writ of Certiorari

No. 18745

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JAMES STEVEN HOGG, - - - - - *Plaintiff-Appellee,*

v.

UNITED STATES OF AMERICA, - *Defendant-Appellant.*

APPEAL from the United States District Court for the Eastern District of Kentucky.

OPINION—Decided and Filed May 28, 1969.

Before: O'SULLIVAN, PHILLIPS and COMBS,* Circuit Judges.

PHILLIPS, Circuit Judge. This appeal presents the question of whether the District Court had jurisdiction to strike the notice of appeal of the United States in a tax case on the ground that it was not properly authorized. The notice was filed by the United States Attorney, who was one of the attorneys of record, at the direction of an attorney in the Tax Division of the Department of Justice who claims that he had been delegated the power to authorize such filings. The District Court struck the notice of appeal on the ground that at the time of its filing the Solicitor General had not authorized an appeal.

The action of the District Court which gives rise to this appeal occurred in post-trial proceedings in a civil tax refund suit. The jury returned a verdict in favor of the taxpayer on August 2, 1967. A judgment was rendered direct-

*Judge Combs did not participate in the decision in this case.

ing a refund of income taxes plus interest. On September 14, 1967, the United States moved for a new trial and requested that the hearing on its motion be deferred until not less than 30 days after it received a copy of the transcript of the trial proceedings. On November 15, 1967, the District Court conducted a hearing on the motion for a new trial and overruled it, rejecting the Government's request that the hearing be postponed until a transcript of the trial proceedings became available.

A timely notice of appeal in proper form was filed on behalf of the United States on January 8, 1968. It is this notice of appeal, filed pursuant to Rule 73 of the Fed. R. Civ. P.,[1] which is the center of controversy on the present appeal.

A motion was made in the District Court for an extension of time for filing the record and docketing the appeal in this Court, on the ground that the trial transcript was not available from the court reporter and that, due to a backlog, the court reporter would not be able to complete the transcript until the spring of 1968.[2] The transcript was necessary, the Government alleged, because:

> "In order for the Solicitor General to direct the filing of a record with the Sixth Circuit Court of Appeals, he must examine a transcript of the trial proceedings well in advance of the deadline for filing such record."

The District Court granted the Government's motion and extended the time for filing the record and docketing the appeal until April 7, 1968.

After this extension had been granted, the taxpayer filed a motion in the District Court to strike and expunge from the record the notice of appeal, pursuant to Rule 11,

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[1]At the time of the order of the District Court, Rule 73 was in effect. The applicable part of Rule 73 has been superseded by Rules 3 and 4, Fed. R. App. P., effective July 1, 1968.

[2]The court reporter, who had a heavy backlog of work, was not able to deliver the transcript to the Tax Division of the Department of Justice until June 28, 1968.

Fed. R. Civ. P. This motion of the taxpayer was sustained by the District Court on March 19, 1968. The order from which the present appeal is taken provided that the notice of appeal "is hereby stricken and expunged from the record" and directed that the clerk of the District Court not prepare for transmittal or transmit the record to the Court of Appeals.

A timely notice of appeal was filed by the United States on May 13, 1968, from the order of the District Court striking the earlier notice of appeal. The taxpayer then filed a motion in this Court to dismiss this "purported appeal." On June 7, 1968, this Court entered an order holding that the order of the District Court striking the Government's notice of appeal and expunging it from the record was a final order from which an appeal was allowed. The clerk of this Court was directed to docket the appeal on the basis of the notice of appeal filed by the United States on May 13, 1968.[3] The motion of the taxpayer to dismiss the appeal was overruled.

We hold that the District Court had no power to strike the Government's notice of appeal of January 8, 1968, on the ground that it was not authorized by the Solicitor General. The notice of appeal operated to transfer jurisdiction of the case to this Court, and therefore the District Court had no jurisdiction to act except in aid of the appeal as authorized by the Fed. R. Civ. P. *Keohane* v. *Swarco, Inc.*, 320 F. 2d 429 (6th Cir.); *United States* v. *Frank B. Killian Co.*, 269 F. 2d 491 (6th Cir.). The order of the District Court striking the notice of appeal was not an act authorized by the Rules in aid of the appeal and it therefore is a nullity. Any objection as to the authorization for the filing of the notice of appeal raises a question addressed to this Court's appellate jurisdiction and is not within the jurisdiction of the District Court.

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[3] In the same order directing the docketing of the present appeal this Court denied the motion of the Government for a writ of mandamus to compel the District Court to reinstate the struck notice of appeal.

In view of our holding, any discussion as to whether the notice of appeal was properly authorized would be dictum on this appeal. Therefore we reserve the determination of that question until such time as it is properly raised.

We hold that the District Court committed error in striking the Government's notice of appeal. The order of the District Court entered March 19, 1968, which struck the Government's notice of appeal and expunged it from the record, is vacated, and the notice of appeal filed by the United States on January 8, 1968, is reinstated and will remain in effect. The clerk of the District Court is directed to prepare and transmit to the clerk of this Court the record and transcript in the case of *James Steven Hogg* v. *United States*, Civil Action No. 570, on the Jackson, Kentucky, docket. An extension of time of 60 days from the date of this opinion is granted for the filing of the record and the docketing of the appeal.

APPENDIX C.

Judgment,
Entered in *Hogg* v. *United States*,
428 F. 2d 274 (6 Cir. 1970),
Sought To Be Reviewed

No. 19,716

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JAMES STEVEN HOGG, - - - - *Plaintiff-Appellee.*

v.

UNITED STATES OF AMERICA, - - *Defendant-Appellant.*

APPEAL from the United States District Court for the Eastern District of Kentucky.

JUDGMENT—Filed June 24, 1970.

BEFORE: PHILLIPS, Chief Judge, EDWARDS, Circuit Judge and O'SULLIVAN, Senior Circuit Judge.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Kentucky and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the case is remanded for a new trial.

It is further ordered that Defendant-Appellant recover from Plaintiff-Appellee the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by order of the Court.
CARL W. REUSS,
Clerk.

Issued as Mandate:

COSTS: NONE

APPENDIX D.

Order on Rehearing
Entered August 12, 1970,
in
***Hogg* v. *United States*, 428 F. 2d 274 (6 Cir. 1970)**

No. 19,716

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JAMES STEVEN HOOD, - - - - *Plaintiff-Appellee.*

v.

UNITED STATES OF AMERICA, - - *Defendant-Appellant.*

ORDER—Entered and Filed August 12, 1970.

Before PHILLIPS, Chief Judge, EDWARDS, Circuit Judge and O'SULLIVAN, Senior Circuit Judge.

No member of the Court having suggested a rehearing in banc, the petition for rehearing has been considered by the panel that heard the appeal.

Upon consideration, it is ORDERED that the petition for rehearing be and hereby is denied.

Entered by order of the Court.

CARL W. REUSS,
Clerk.

Appendix B
Statutes, Rules of Court and Regulations Involved

Federal Rules of Civil Procedure

Rule 11. Signing of Pleadings. Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address. * * * The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.

Rule 61. Harmless Error. No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Rule 73. Appeal to a Court of Appeals.

(a) How and When Taken. An appeal permitted by law from a district court to a court of appeals shall be taken by filing a notice of appeal with the district court within 30 days from the entry of the judgment appealed from, except that: (1) in any action in which the United States

or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days from such entry; (2) upon a showing of excusable neglect the district court in any action may extend the time for filing the notice of appeal not exceeding 30 days from the expiration of the original time herein prescribed; . . . .

Federal Rules of Criminal Procedure

Rule 37. Taking Appeal; and Petition for Writ of Certiorari.

(a) TAKING APPEAL TO A COURT OF APPEALS.

(1) *How an Appeal Is Taken; Notice of Appeal.* An appeal permitted by law from a district court to a court of appeals is taken by filing a notice of appeal in the district court within the time provided by paragraph (2) of this subdivision. • • •

(2) *Time for Taking Appeal.* The notice of appeal by a defendant shall be filed within 10 days after the entry of the judgment or order appealed from. • • • When an appeal by the government is authorized by statute, the notice of appeal shall be filed within 30 days after entry of the judgment or order appealed from. • • • Upon a showing of excusable neglect, the district court may, before or after the time has expired, with or without motion and notice, extend the time for filing the notice of appeal otherwise allowed to any party for a period not to exceed 30 days from the expiration of the original time prescribed by this paragraph.

Federal Rules of Appellate Procedure

Rule 3

APPEAL AS OF RIGHT—HOW TAKEN

(a) **Filing the Notice of Appeal.** An appeal permitted by law as of right from a district court to a court of appeals shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4. • • •

Rule 4

APPEAL AS OF RIGHT—WHEN TAKEN

(a) Appeals in Civil Cases. In a civil case (including a civil action which involves an admiralty or maritime claim and a proceeding in bankruptcy or a controversy arising therein) in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days of the date of the entry of the judgment or order appealed from; but if the United States or any officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days of such entry. • • •

Upon a showing of excusable neglect, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision. Such an extension may be granted before or after the time otherwise prescribed by this subdivision has expired; but if a request for an extension is made after such time has expired, it shall be made by motion with such notice as the court shall deem appropriate.

(b) Appeals in Criminal Cases. In a criminal case the notice of appeal by a defendant shall be filed in the district court within 10 days after the entry of the judgment or order appealed from. • • • When an appeal by the government is authorized by statute, the notice of appeal shall be filed in the district court within 30 days after the entry of the judgment or order appealed from. • • • Upon a showing of excusable neglect the district court may, before or after the time has expired, with or without motion and notice, extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision.

Attorney General's Regulations, Section 0.20;
28 C.F.R. § 0.20

Subpart B—Office of the Solicitor General

§ 0.20 General Functions.

Subject to the general supervision and direction of the Attorney General, the following-described matters are assigned to, and shall be conducted, handled, or supervised by, the Solicitor General, in consultation with each agency or official concerned:

(a) Conducting, or assigning and supervising, all Supreme Court cases, including appeals, petitions for and in opposition to certiorari, briefs and arguments, and, in accordance with § 0.163, settlement thereof.

(b) Authorizing or declining to authorize appeals by the Government to all appellate court, including petitions for rehearing *en banc*.

(c) Authorizing the filing of all briefs *amicus curiae* by the Government in all appellate courts.

(d) Surveying and listing appellate cases in the courts of appeals in which the Government is participating.

Attorney General's Order No. 207-60, July 18, 1960, Sections 5 and 6(a), not published officially

Sec. 5. Appeals to be authorized by Solicitor General; how taken.

(a) Except as provided in section 6 hereof, no appeal shall be prosecuted to a court of appeals without the express authorization of the Solicitor General. The appropriate division of the Department shall procure the views of the interested agencies, and the Solicitor General shall determine, after considering the reports and recommendations submitted to him, whether an appeal should be taken. The United States Attorney shall be notified promptly of the Solicitor General's determination.

(b) An appeal from a district court to a court of appeals, in a criminal or in a civil case, shall be taken by the

filing of a notice of appeal in the office of the clerk of the district court, as provided by Rule 37(a) of the Federal Rules of Criminal Procedure, in criminal cases, and by Rule 73 of the Federal Rules of Civil Procedure, in civil cases. A copy of such notice shall be forwarded promptly to the appropriate division of the Department.

Sec. 6. Protective notice of appeal.

(a) If the time for appeal is about to expire and the United States Attorney has not received notice from the appropriate division of the Department as to whether an appeal is to be taken, a notice of appeal—commonly called a "protective" notice of appeal—should be filed in order to preserve the Government's right to appeal, and such action should be reported to the appropriate division of the Department. In order that the Department may have adequate time to consider the case, such notice of appeal should not be filed sooner than five days before the time for appeal expires.

* * *

Internal Revenue Code of 1954, Section 6653

26 U.S.C. § 6653. *Failure to pay tax.*

(a) **Negligence or intentional disregard of rules and regulations with respect to income or gift taxes.**—If any part of any underpayment (as defined in subsection (c) (1)) of any tax imposed by subtitle A or by chapter 12 of subtitle B (relating to income taxes and gift taxes) is due to negligence or intentional disregard of rules and regulations (but without intent to defraud), there shall be added to the tax an amount equal to 5 percent of the underpayment.

(b) **Fraud.**—If any part of any underpayment (as defined in subsection (c)) of tax required to be shown on a return is due to fraud, there shall be added to the tax an amount equal to 50 percent of the underpayment. In the case of income taxes and gift taxes, this amount shall be in lieu of any amount determined under subsection (a).

(c) Definition of underpayment.—For purposes of this section, the term "underpayment" means—

(1) Income, estate, and gift taxes.—In the case of a tax to which section 6211 (relating to income, estate, and gift taxes) is applicable, a deficiency as defined in that section (except that, for this purpose, the tax shown on a return referred to in section 6211(a)(1)(A) shall be taken into account only if such return was filed on or before the last day prescribed for the filing of such return, determined with regard to any extension of time for such filing), and * * *

Treasury Regulations, Section 301.6653-1

26 C.F.R. § 301.6653-1. *Failure to pay tax.*

(a) *Negligence or intentional disregard of rules and regulations with respect to income or gift taxes.* If any part of any underpayment, as defined in section 6653(c)(1) and paragraph (c)(1) of this section, of any income tax imposed by subtitle A or gift tax imposed by chapter 12 of subtitle B of the Code, is due to negligence or intentional disregard of rules and regulations, but without intent to defraud, there shall be added to the tax an amount equal to 5 percent of the underpayment.

(b) *Fraud.* (1)If any part of any underpayment of tax, as defined in section 6653(c) and paragraph (c) of this section, required to be shown on a return is due to fraud, there shall be added to the tax an amount equal to 50 percent of the underpayment.

* * *

(c) *Definition of underpayment*—(1) *Income, estate, and gift taxes.* In the case of income, estate, and gift taxes, an underpayment for purposes of section 6653 and this section is—

(i) The total amount of all deficiencies as defined in section 6211, if a return was filed on or before the

last date (determined with regard to any extension of time) prescribed for filing such return, or

(ii) The amount of the tax imposed by subtitle A or B, as the case may be, if a return was not filed on or before the last date (determined with regard to any extension of time) prescribed for filing such return.

• • •

Title 28, United States Code, *Judiciary and Judicial Procedure*

28 U.S.C. § 2111. *Harmless error.*

On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.